

¹ Gary R. Terrill, of Overland Park, Kansas, was appointed as a Pro Tem in this matter.

In this case, Claimant had significant degenerative cond[i]tion in her right knee. However, Claimant was not disabled or impaired in any way due to the condition of her right knee until she fell at work. As a result of that fall, Claimant not only had to have her meniscus repaired, it aggravated her underlying degenerative condition to the point that she had to have a total right knee replacement. Therefore, Claimant's need for a total right knee replacement was casually *[sic]* related to her work accident of May 19, 2008.²

The ALJ awarded claimant disability benefits for a 75% permanent partial impairment to the right leg at the level of the knee. The ALJ also granted claimant's request that \$259.27 in prescription costs be reimbursed as an unauthorized medical expense. At oral argument, the parties stipulated that this is no longer an issue, as respondent has agreed to reimburse claimant for the prescription costs.

Respondent argues the ALJ erred by finding that claimant's need for a knee replacement was causally related to her work accident and in assigning a 75% permanent partial impairment. Respondent also argues that claimant has not met her burden of proving that the work accident caused the need for knee replacement surgery or the impairment that resulted therefrom. Respondent asserts claimant suffered at most a torn meniscus at the time of her work-related accident and that claimant should be awarded a 2% permanent partial impairment to the lower extremity based upon the torn meniscus. Should the Board find claimant's need for knee replacement was causally related to claimant's work accident, respondent submits claimant's permanent partial impairment should be limited to 50% pursuant to the opinions of respondent's medical expert, Dr. John A. Pazell.

Claimant requests the Board affirm the ALJ's Award of a 75% permanent partial impairment to her right knee based upon the opinions of claimant's medical expert, Dr. Daniel D. Zimmerman and claimant's testimony. Claimant asserts she had no impairment to her right knee prior to her accident.

The issue before the Board on this appeal is:

What is the nature and extent of claimant's disability? Specifically, was claimant's need for knee replacement surgery and the resulting impairment caused by her work related accident?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

² ALJ Award (Apr. 22, 2011) at 6.

On May 19, 2008, claimant stepped off of a step and slipped on spilled coffee and fell landing on a concrete floor. As a result of the fall, claimant injured her right knee. Claimant testified that prior to her accident, she never received treatment for her right knee or had any x-rays of her right knee. Claimant was adamant that before her accident, she had no symptoms, pain or stiffness in her right knee.³ Prior to the accident, claimant was on Lortab for kidney disease and chronic kidney stones.

Claimant was initially seen by Dr. Ronald Huffman, and was sent for an MRI of the right knee on May 23, 2008. The MRI revealed slight degenerative changes with chondromalacia, a small joint effusion, a popliteal cyst and a probable small ganglion. The MRI also showed a small meniscal lesion. Claimant was next seen by Dr. Howard Wilcox, who also felt the MRI revealed a meniscus tear. Dr. Wilcox obtained x-rays which showed degenerative changes in the right knee. He referred claimant to Dr. Bradley Poole, another orthopedic doctor, in the same office.

Initially claimant was treated by Dr. Poole with pain medication and Euflexxa injections. On June 18, 2008, Dr. Poole performed an arthroscopy which revealed a medial meniscus tear and grade III to grade IV change of a lateral tibial plateau, grade IV change to medial femoral condyle, grade III to IV change of the medial tibial plateau and grade III change to the patella and trochlea.⁴ When the arthroscopy did not resolve claimant's symptoms, she was referred to Dr. Joe Mumford, who performed a right total knee replacement on February 3, 2009. Claimant was released to full duty by Dr. Mumford on February 4, 2010.

At the request of her attorney, claimant was seen on June 8, 2010, by Dr. Daniel D. Zimmerman, an internal medicine physician who is also an independent medical examiner certified by the American Board of Independent Medical Examiners. Dr. Zimmerman reviewed past medical records of claimant, obtained a medical history and physically examined claimant. He also obtained x-rays of claimant's right knee.

Dr. Zimmerman opined that due to permanent aggravation of chondromalacia and a medial meniscus tear leading to a right knee replacement that was causally related to the May 19, 2008, accident, claimant has a 75% right knee impairment in accordance with the *AMA Guides*.⁵ He indicated his rating was based upon the fact claimant had a poor result from her surgery. Dr. Zimmerman testified claimant has severe chronic pain in her right

³ R.H. Trans. at 13-14.

⁴ Pazell Depo. at Ex. 2 at 4 (Dr. Pazell's Jan. 5, 2011 IME report at 2).

⁵ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

knee and a limited range of motion, and indicated claimant was credible in her complaints of pain and her pain complaints were compatible with a poor surgical result.⁶

Dr. Zimmerman restricted claimant to lifting ten pounds occasionally and five pounds frequently, avoid frequent flexing of the right knee and, avoid frequent bending, stooping, squatting, crawling, kneeling and twisting activities.⁷

Dr. Zimmerman indicated that if claimant was asymptomatic prior to her accident, it would not alter his impairment rating, but it might cause him to apportion part of the impairment rating to her pre-existing condition.⁸ At his deposition, Dr. Zimmerman was questioned by respondent's counsel about an injury claimant had on July 24, 2008, and about a right knee surgery claimant had before the accident. Dr. Zimmerman indicated that he was unaware that claimant suffered a knee fracture and underwent surgery prior to May 19, 2008. Dr. Zimmerman testified that he did not ask claimant about an incident on July 24, 2008, when she felt a sharp pop in her right knee, while exercising at home.⁹

Respondent referred claimant to Dr. John A. Pazell, an orthopedic surgeon, for examination. Dr. Pazell physically examined claimant on January 5, 2011. He also reviewed claimant's medical records (including Dr. Zimmerman's report) and obtained claimant's medical history. Dr. Pazell's report indicated that claimant felt a sharp pop in her right knee and had medial joint line pain on July 24, 2008, while at home. Upon cross-examination, Dr. Pazell testified physical therapy notes indicated claimant felt a pop in the knee while doing exercises during physical therapy. His report also indicates claimant gave a history of right wrist, nose, neck and knee fractures, and a past history of knee surgery.¹⁰ Dr. Pazell testified that claimant also reported loss of sleep due to knee pain, reduced mobility while getting in and out of cars, trouble using the bathroom, problems walking and standing, and daily pain and swelling in her knee.¹¹

Dr. Pazell opined claimant suffered a medial meniscus tear as a result of her May 19, 2008, accident. He testified her degenerative changes predated the injury of May 19, 2008. He also testified he believed claimant was not asymptomatic in her knee before the accident:

⁶ Zimmerman Depo. at 23-24.

⁷ *Id.* at 6.

⁸ *Id.* at 20-21.

⁹ *Id.* at 17-20.

¹⁰ Pazell Depo. at Ex 2 at 6 (Dr. Pazell's Jan. 5, 2011 IME report at 4).

¹¹ *Id.* at 17-18.

Q. (Mr. Laskowski) There is as in many of these case maybe some dispute as to whether Ms. Oshel was symptomatic or asymptomatic in her knee prior to May 19, 2008. In your opinion based on the degree of degenerative changes that existed, do you believe it is reasonable to believe Ms. Oshel was asymptomatic?

A. (Dr. Pazell) I asked her about that specifically. She said from time to time she had a little trouble with her knee but not significantly. But given the fact that four days after her fall she had degenerative changes, I don't think she was asymptomatic.¹²

As a consequence of the torn medial meniscus suffered in her accident, Dr. Pazell opined claimant has a 2% permanent impairment to her right knee according to the 4th edition of the *AMA Guides*. Dr. Pazell opined that claimant's total right knee replacement was not causally related to her work injury, but that claimant had a "pretty good" surgical result from the right total knee replacement, and pursuant to the *AMA Guides*, he gave claimant a 50% permanent impairment to the right lower extremity. He indicated claimant had 90 degrees of flexion in a seated position, which is acceptable.

Claimant was deposed after the regular hearing to clear up the issue of her medical history and the July 24, 2008, incident. Claimant testified she did not tell Dr. Pazell she had a right knee fracture or underwent right knee surgery prior to her May 19, 2008, accident. She also testified she had no right knee problems before May 19, 2008. According to claimant, Dr. Poole gave her home exercises to perform. As she was performing squats, she stood up and felt a loud pop and instant burning. When she was able to see Dr. Poole, he told her she likely tore the rest of her meniscus.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2007 Supp. 44-501(a) in part, states, "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510d in part, states,

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A.

¹² *Id.* at 11.

44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

....

(16) For the loss of a leg, 200 weeks.

....

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.A.R. 51-7-8(c)(4) states:

An injury at the joint on a scheduled member shall be considered a loss to the next higher schedule.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.¹³ The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.¹⁴ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.¹⁵

In her Award, the ALJ found claimant has a 75% permanent functional impairment to her right knee and that there was a causal connection between her work-related injury and the necessity for her total right knee replacement. Respondent argues claimant suffered only a torn meniscus in her right knee and should be rendered an award based upon the 2% permanent impairment rating of Dr. Pazell. Claimant asks the Board to affirm the ALJ in all respects.

¹³ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

¹⁴ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

¹⁵ *Nance v. Harvey County*, 263 Kan. 542, 547-550, 952 P. 2d 411 (1997).

The greater weight of the evidence suggests that claimant's injury on May 19, 2008, caused a significant aggravation of her preexisting degenerative disease. Claimant testified that prior to the accident, she had little, if any, problems with her right knee. Until her injury, claimant had never sought medical treatment for right knee problems, and was essentially asymptomatic. Dr. Zimmerman indicated claimant had no right knee complaints until after her accident and that the accident caused her degenerative disease to be significantly aggravated. He found claimant to be a credible witness.

Dr. Pazell testified that he did not believe that claimant was asymptomatic before her injury, but gave no credible reason for his belief. Dr. Pazell erroneously believed claimant had a knee fracture that preexisted the accident. Respondent argues claimant was taking Lortab "on and off" for a kidney condition and this could have somehow prevented claimant's knee from being painful. Claimant now takes Oxycontin and a higher dosage of Lortab on a regular basis, yet continues to have significant right knee pain.

Claimant testified that prior to her accident on May 19, 2008, she had no symptoms of right knee pain. After her accident, claimant had severe right knee pain, which she continues to suffer. Claimant has met her burden of proof that the preexisting degenerative disease in her right knee was significantly aggravated by her accident and necessitated her total right knee replacement.

Drs. Zimmerman and Pazell differ on the results achieved from the total right knee replacement. Both physicians present credible reasons to support their opinions. Dr. Zimmerman indicates claimant suffers from chronic knee pain, and that is why he opined claimant has a 75% permanent impairment. Dr. Pazell believes claimant had good flexion after her surgery, and opined she has a 50% permanent impairment. The Board determines the opinions of both physicians should be given equal deference and finds claimant has a 62.5% permanent impairment of the right knee.

CONCLUSION

1. Claimant injured her right knee by accident that arose out of and in the course of her employment. Specifically, claimant aggravated a preexisting degenerative disease in her right knee.

2. A causal connection exists between claimant's injury and the necessity for her total right knee replacement. Claimant's need for a total right knee replacement was accelerated by her accident.

3. The Board gives equal deference to the opinions of Drs. Zimmerman and Pazell and, accordingly, finds claimant has a 62.5% permanent impairment to the right knee.

4. Respondent shall pay \$259.27 in prescription costs to claimant as reimbursement for unauthorized medical expenses.

AWARD

WHEREFORE, the Board Modifies the April 22, 2011, Award entered by ALJ Sanders as follows:

Claimant is entitled to 14.00 weeks of temporary total disability compensation at the rate of \$373.35 in the amount of \$5,226.90, followed by 116.25 weeks of permanent partial disability compensation, at the rate of \$373.35 per week, in the amount of \$43,401.94 for a 62.5% loss of use of the right leg, making the total award \$48,628.84.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

Dated this ____ day of August, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Cynthia J. Patton, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge